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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 467

AYRSHIRE COLLIERIES CORPORATION, ET AL., AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

BRIEF FOR RAILROAD APPELLANT.

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OPINIONS BELOW.

The District Court filed no opinion. It did make certain Findings of Fact and Conclusions of Law. (R. 108.) These have not been published.

The report of the Interstate Commerce Commission (R. 164) is set forth in 263 I. C. C. 179.

JURISDICTION.

The final decree of the District Court was entered on June 5, 1946. (R. 111.) The petition for appeal was filed on July 30, 1946. It was allowed on August 1, 1946. (R. 119.) The jurisdiction of this Court is invoked under Section 210 of the Judicial Code (38 Stat. 220; 28 U. S. C., Sec. 47a).

STATEMENT OF THE CASE.

Two suits in this cause were originally filed in the District Court. One was brought by the Indiana coal mining companies for the coal producers of Indiana, and one was brought by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter sometimes referred to as the "Railroad", or the "Milwaukee".

Since the issues were quite similar and because each petitioner asked that the order of the Interstate Commerce Commission be set aside, the cases were consolidated for trial. They remain so consolidated in this appeal from a judgment dismissing both petitions. (R. 111.)

This brief is concerned only with the law and facts upon which the Railroad relies. The Indiana operators have filed a separate brief.

The issues involved can best be delineated by stating that the case at bar is essentially simply a retrial of the issues previously determined by this Court in *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U. S. 499.

In that case, Mr. Justice Cardozo, who spoke for the Court, condemned a report and order of the Interstate Commerce Commission because it denied to the same railroad, appealing herein, its right to establish rates which it considered necessary to permit it to transport coal in competition with other rail carriers. In condemning the order, Mr. Justice Cardozo defined a "zone of reasonableness" within which a carrier is privileged to exercise its own discretion in adjusting its charges. Such rates must be upheld, he said, unless by the most precise and clear findings they can be held to violate some section of the Interstate Commerce Act.

The order in question in this case deals with competitively compelled rates on coal. They are proposed by the same railroad, and generally they apply between the same points involved in the above cited decision.

It is believed, and sincerely urged, that the decision in *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U. S. 499, *supra*, requires the setting aside of the present order. The Commission has again exceeded the scope of its delegated powers. It has again performed an act previously condemned in unequivocal terms by this Court.

It is the earnest contention of the appellant railroad that unless it is set aside, the Commission's order will unquestionably prohibit the appellant from competing for the transportation of coal from mines located on its tracks to important coal-consuming destinations. This is an inescapable consequence of the order, since it requires the Milwaukee Railroad to assess higher rates for shorter hauls than its competitors charge for longer hauls from other mines to the same destinations. That the Commission should promulgate an order having this result is anomalous in view of its finding that transportation con-

ditions in this area are all so similar that they require the application of the same rate basis. (Finding Number 8, R. 207.)

Not only is competition between rail carriers stifled by the order but it also places in an unfavorable competitive position the producers of coal whose mines are located on the Milwaukee Railroad. Because of the higher rates on the Milwaukee, these producers cannot compete in the sale of coal in important industrial cities with those producers located on other railroads whose transportation charges are less for longer hauls.

With the exception of the question raised herein concerning the competency of a trial Court consisting of only two judges to determine the issues in this case, and which will be more fully discussed later, this Court need only examine the report and order of the Commission (R. 164) to determine the facts upon which the Railroad relies. Insofar as the case of the Railroad is concerned, these facts are not in dispute.

To one not familiar with coal rate adjustments, however, the Commission's long report is likely to be confusing. If the appellant Railroad cannot make the issues clear to this Court, there is a strong possibility that the Commission's order will be sustained on the assumption that that Body was correct in its conclusions concerning a subject in which it is expert. Accordingly, we shall attempt to make our statement of the facts and issues with greater clarity than they appear in the report.

Bituminous coal is produced in Illinois, in Indiana, and in western Kentucky. Markets for this coal are located principally in the north and west. The better quality of eastern coal makes sales in that direction inconsequential. In the making of rates, it is the common practice to group together mines which are located in the same general area.

Stated otherwise, a common rate applies from all the mines in a given group to any particular destination. There are a number of such mining groups in Illinois and in Indiana.

We are here principally concerned with the Springfield and the southern Illinois groups in Illinois, and those known as the Brazil, Linton, Princeton and Booneville groups in Indiana. The Milwaukee serves mines only in the Brazil and Linton groups and no other mines in the mid-west. (R. 176.) Due to the insistence of the Milwaukee Railroad of its right to establish and maintain competitive rates with those applicable from mines in Illinois, the rates via its single line from mines it serves to Rockford, have been lower than the rates from other mines in the groups on other railroads, as those railroads failed to make reductions to conform to changes required by the Illinois Commerce Commission in the rates from Illinois mines to Rockford. There is one exception, the Illinois Central Railroad has for some time published competitive rates from mines it serves in the Linton group. The right of the Milwaukee Railroad to maintain rates which would permit it to compete in the movement of coal traffic was before this Court in *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U. S. 499, *supra*. The map to be found at the end of this statement of facts delineates clearly, it is believed, the location of these groups. On July 20, 1933, the Commission issued an order (*Fairbanks-Morse Company, et al.* v. *Alton & Southern Railroad, et al.*, 195 I. C. C. 365) in which it found that differences in rates from the above groups were prejudicial to Beloit, Wisconsin when compared to the rates from the same origins to Rockford, Illinois. Since the carriers were at liberty to correct the prejudice by whatever means they chose, they reduced the rates to Beloit.

On March 3, 1942, the Commission issued another report

(*Fairbanks-Morse Company* v. *Alton & Southern Railroad, et al.*, 251 I. C. C. 181) in which the rates on coal from mines in Illinois, Indiana and western Kentucky to Beloit, Wisconsin were found to be reasonable but nevertheless prejudicial to Beloit, as compared to the lower rates from the same origins to Rockford, Illinois.

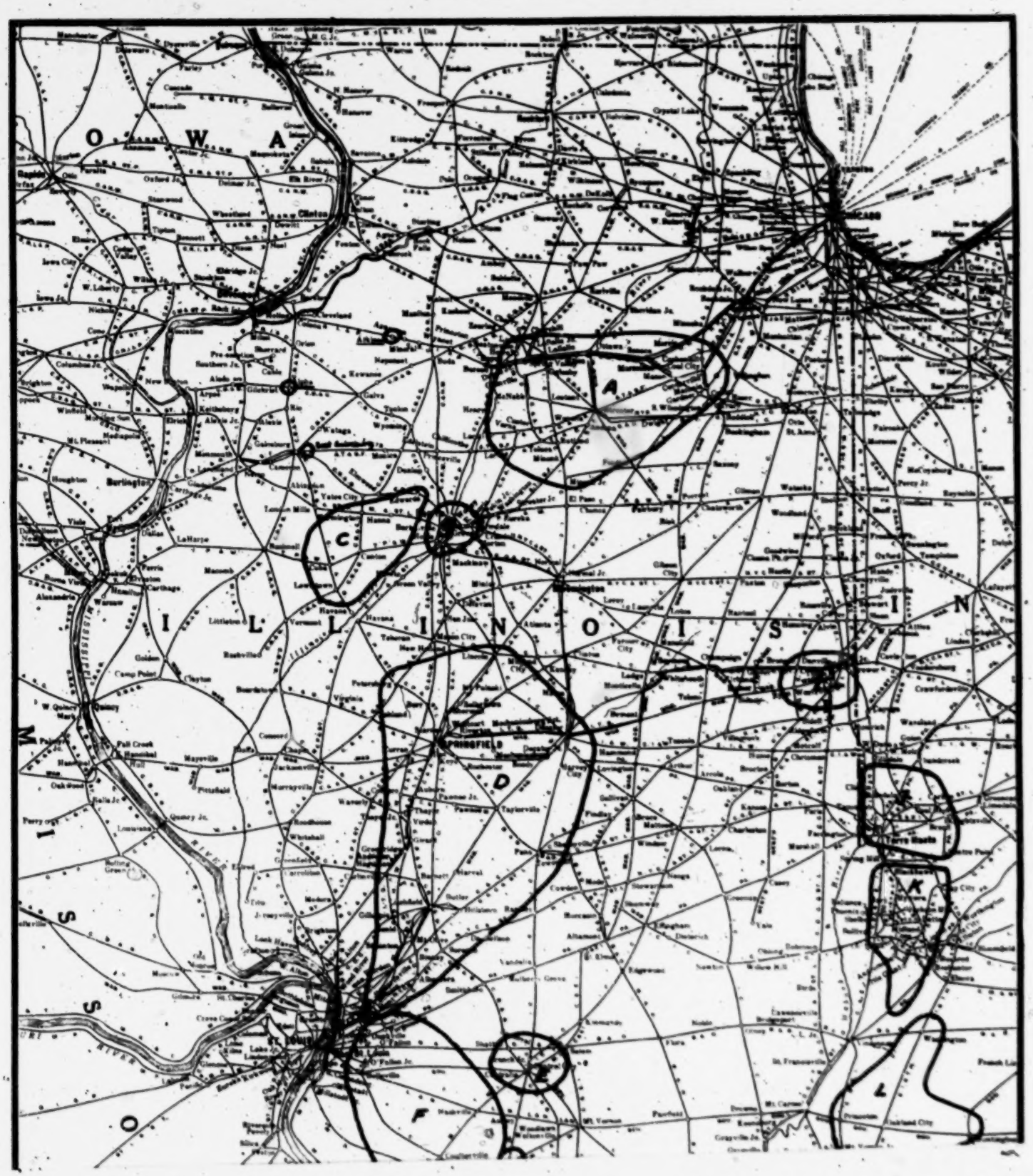
Since the first order had been complied with by reducing the rates to Beloit, the carriers now determined to comply with the new order by increasing the rates to Rockford. In doing this, they reasoned that since the rates to Rockford had been relatively low, the increase made necessary by the order would bring the rates more nearly in conformity with the general level of interstate coal rates in the territory. (R. 168.)

Accordingly, the carriers published new schedules which generally increased rates to Rockford from all mining groups. They proposed no change in the rates to Beloit, except in a few instances which are of no consequence here.

Rockford is located in northern Illinois. It is only 18 miles south of Beloit, Wisconsin. Accordingly, speaking generally, coal from any of the above-named groups must travel 18 miles farther on the Milwaukee Road to arrive at Beloit than to reach Rockford.

The Milwaukee Road serves both Rockford and Beloit. It also serves mines in the Brazil and Linton groups in Indiana. As did the other carriers, and as previously stated, the Milwaukee Road proposed increases in compliance with the second order in its rates to Rockford but made no change in its rates to Beloit. The Commission then issued the order which is here under review. In that order, it approved, with certain exceptions not pertinent here, all of the rate adjustments proposed by the railroads with the exception of those rates proposed by the Milwaukee Road. It is the Commission's refusal

COAL PRODUCING GROUPS IN ILLINOIS, INDIANA AND WESTERN KENTUCKY.



to approve the Milwaukee Railroad's rates which presents the issue on this appeal.

The order, in essence, required that the Milwaukee make greater increases in its rates to Rockford than those it proposed and *also* make an increase in its rates to Beloit. The Milwaukee had originally proposed to increase the rates to Rockford by 15¢. The Commission's order required them to be increased by 27¢. It also required an increase in the rates to Beloit of 12¢. To require that the Milwaukee Road charge a higher rate to these points than that charged by other rail carriers for longer hauls obviously impairs its competitive position as well as that of coal producers located on its line. The legality of an order producing this result must be determined by this Court.

SPECIFICATION OF ERRORS.

It is respectfully urged that the District Court was in error in the following particulars:

1. It determined the issues and dismissed the complaint while one of the statutory three-Judge Court was absent from the bench because of illness and was, therefore, unable to participate in the determination and disposition of the case.

2. It failed to find that the Order of the Commission in I. & S. Docket 5139, *Coal to Beloit, Wisconsin and Northern Illinois* is arbitrary and not adequately supported by findings of the Commission. It failed to find that the order should, therefore, be set aside and its enforcement perpetually enjoined.

3. It failed to hold that a railroad may lawfully initiate rates which are within the zone of reasonableness if the carrier deems such rates necessary to meet competitive conditions.

4. It failed and refused to enjoin the order of the Commission, which order required the appellant railroad to alter its rates in a specific manner, in order to remove alleged discrimination for which the appellant railroad was not responsible.

5. It failed to enjoin enforcement of the Commission's order on the ground that the order, while requiring the removal of discrimination, afforded the carrier no alternative as to the manner in which the removal of discrimination might be accomplished.

6. It failed to enjoin the Commission's order as being arbitrary, based upon a mistake of law and beyond the power delegated to the Commission by Congress.

SUMMARY OF ARGUMENT.

The Appellant Railroad urges that the judgment of the lower Court must be reversed and set aside, as there was no determination of the issues by the required statutory three-Judge Court. Here only two Judges determined the issues and entered the judgment due to the inability of the third Judge to act.

A railroad is free to publish rates necessary for it to participate in competition with other carriers in the transportation of available traffic. Under the law, it has the right to initiate rates which the Interstate Commerce Commission can require to be cancelled or altered only if, after hearing, such rates are found to be in contravention of some provision of the Interstate Commerce Act.

Findings of the Commission, sufficient to support an order requiring the cancellation or alteration of railroad proposed rates, must be clear and precise and inform the parties the reasons which led the Commission to reach its conclusion.

A mere statement by the Commission in its report or order that the involved rate is unlawful, in violation of some particular section of the Interstate Commerce Act, is not an adequate finding. The Interstate Commerce Commission here required the cancellation of proposed rates, and the modification of existing rates with the simple recital that such rates violate Sections 2 and 3(1) of the Interstate Commerce Act. Nowhere in the report, does it appear that the Milwaukee Railroad controls rates applicable for the transportation of coal from the mines or mining areas said to be discriminated against. The Com-

mission nowhere afforded the Milwaukee an alternative method of removing the alleged discrimination.

The report of the Commission is long and involved and recitals in the report convincingly establish that the Commission misconceived its power and believed it could require the Milwaukee Railroad to alter its rates, not because they were violative of some section of the Act but because, in the opinion of the Commission, the rates it ordered altered would fit into a differential relationship of coal rates from the various mining groups, the lawfulness of which relationship was not passed upon.

ARGUMENT.

I.

An Injunction Proceeding, the Object of Which Is to Set Aside an Order of the Interstate Commerce Commission, Must be Heard and Determined by a District Court, Consisting of Three Judges.

The procedure to be followed in an injunctive proceeding, the object of which is to set aside an order of the Interstate Commerce Commission, is set forth in Section 47 of Title 28 of the United States Code. It is stated therein that when such a petition is presented to a Judge he shall call to his assistance, to hear and determine the issues, two other Judges, one of whom at least shall be a Circuit Judge.

The pertinent portion of Section 47 of Title 28, reads, the

> "* * * application * * * shall be presented to a Circuit or District Judge and shall be *heard and determined* by three Judges * * *." (Emphasis supplied.)

The Court to whom this case was submitted and argued consisted of the Honorable Evan A. Evans, Senior Circuit Judge, the Honorable J. Earl Major, Circuit Judge, and the Honorable Michael L. Igoe, District Judge.

After the case had been submitted and argued, but before it had been considered or determined, Judge Evans became ill and was unable to participate further. (R. 108.) Accordingly, while three Judges heard the case, only two participated in its disposition.

This does not comply with the statute, which requires not only that three Judges hear the case but also that the

three Judges determine the issues involved in it. When Judge Evans became ill, the remaining two judges were divested of their power to act under the statute. They had no alternative other than to grant a new trial before a statutorily constituted court.

Judges Major and Igoe, however, held the opinion that since they constituted a majority of the three-Judge court, and since they were in accord as to the conclusions reached, that they might proceed to determine the case.

We think it clear that Congress intended that in proceedings of this character, the power to act is not vested in a court of one Judge or of two Judges but that the issues were of such importance that they must be heard and also determined by a court of three Judges. While it is true, that the majority of the three Judges is empowered to control the conclusion, it is believed that Congress intended that all three-Judges contribute their views before a conclusion is reached.

Nothing can be gained by a lengthy argument concerning this proposition. The language of the statute is clear. A determination can be made only by a court of three Judges.

Mr. Chief Justice Taft, speaking for the Court, in *Cumberland Telephone & Telegraph Company* v. *Louisiana Public Service Commission, et al.*, 260 U. S. 212, in reviewing the action of a District Judge in granting an injunction pending an appeal from an order of a three-Judge Court, which order denied an interlocutory injunction, said on page 218:

> "This statement does not make the order here in question the act of the three judges. Judge Bryan's letter, so far as we are able to judge from this reference, was a mere expression of opinion that Judge Foster as District Judge had the power to grant the injunction, an opinion with which we do not agree.

> The letter was not an attempt by Judge Bryan to become a participant in the order. Nor is there any showing that Judge Clayton took part in the matter. A discussion in conference of the judges as to the granting of an injunction pending an appeal before it was applied for does not supply what is needed to give efficacy to such order by a single judge. Compliance with the statute requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct. * * * We have no proper evidence of the participation of the three judges in the injunction here and therefore grant the motion to set it aside as void and made without jurisdiction."

Two Judges, acting without the third, are without jurisdiction either to enjoin a Commission Order or to dismiss an application seeking injunctive relief. The action of the two Judges, in determining the issues and dismissing the petitions, was beyond their power. The petitioners, however, appellants, here, were as effectively denied relief as though a valid order of dismissal had been entered and relief can now be had only by this appeal.

II.

A Railroad Has the Right to Initiate Rates and the Interstate Commerce Commission Can Require a Cancellation of Schedules Stating New Rates Only After a Hearing and Appropriate Findings Supported by Substantial Evidence That the Proposed Rates Are Unlawful.

In compliance with the Commission's order, in *Fairbanks Morse & Co.* v. *Alton & Southern Railroad, et al.*, 251 I. C. C. 181, requiring that the rates applicable to the transportation of coal from mines in Indiana, Illinois and Western Kentucky to Beloit, Wisconsin, should not exceed

those to Rockford, Illinois, by more than 15¢ per ton, the Milwaukee Road filed tariff schedules with the Commission proposing increases of 15¢ a ton from mines which it served in the Brazil and Linton districts in Indiana to Rockford. It made other changes in its rates from those mines to stations near Rockford in northern Illinois in order to present a consistent rate adjustment and it joined other railroads in proposing increases in the joint rates applicable to the transportation of coal from other mines in other Indiana and Illinois mining districts to the same destinations.

The right of a railroad to initiate rates, provided those rates are not violative of any law, has been repeatedly affirmed by this Court. In *U. S.* v. *Illinois Central Railroad*, 263 U. S. 515 at page 522, we find:

> "A carrier is entitled to initiate rates and in this connection to adopt such policy of rate making as to it seems wise. *I. C. C.* v. *Chicago Great Western Railway Company*, 209 U. S. 108, 118-119; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 92."

See also *U. S.* v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499, 506; *I. C. C.* v. *Columbus & Greenville Ry.*, 319 U. S. 551, 560.

A carrier has the undoubted right to so adjust its rates that it may meet competitive conditions and obtain or retain traffic for its own line. The only limitation on the carrier's right to so initiate rates is that such rates must not be in conflict with the provisions of the Interstate Commerce Act. In *Texas & Pacific Railway Company, et al.* v. *United States of America, et al.*, 289 U. S. 627, at 636, the Court said:

> "As the carriers are in competition for the business they may, within the zone of reasonableness, pre-

scribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 74 Fed. 715, 723-4; 168 U. S. 144, 172-3; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 564; *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 522.

"The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination. *Texas & P. R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197."

The rail carriers have long been in competition in the movement of coal from mines in Indiana, Illinois and Kentucky to Beloit, Wisconsin, and to Rockford, Illinois. In the past the rate structure has been such that the Milwaukee Road secured its proportion of this important traffic. The rates which it proposed and which the Commission here requires to be cancelled would continue in effect the long standing relationships between rates from mines on its railroad and rates from other origins on other railroads to the same destinations.

The Act clearly provides that the Commission can only require the cancellation of schedules proposing new rates when, after hearing, there is a finding supported by evidence that such proposed rates are unlawful.

The authority of the Commission to suspend or require the cancellation of rates is contained in Section 15 (7) of the Interstate Commerce Act, which provides in part as follows:

"Whenever there shall be filed with the Commission any schedule stating a new, individual or joint rate, * * * the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by

> the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate. * * *"

The language of Section 15 (7) leaves no doubt that the carrier has the right to initiate rates and that the Commission is without power to require their cancellation unless such rates, upon convincing evidence, are found to be unlawful, in other words, unless they are found to be in conflict with some provision of the Interstate Commerce Act. A clear statement of this rule is found in *Interstate Commerce Commission* v. *L. & N. Ry. Co.*, 227 U. S. 88, 92:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order."

See also *Texas & Pacific Railroad Company* v. *United States*, 289 U. S. 627.

This issue was before the Court in *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U. S. 499. At page 510, Mr. Justice Cardozo said:

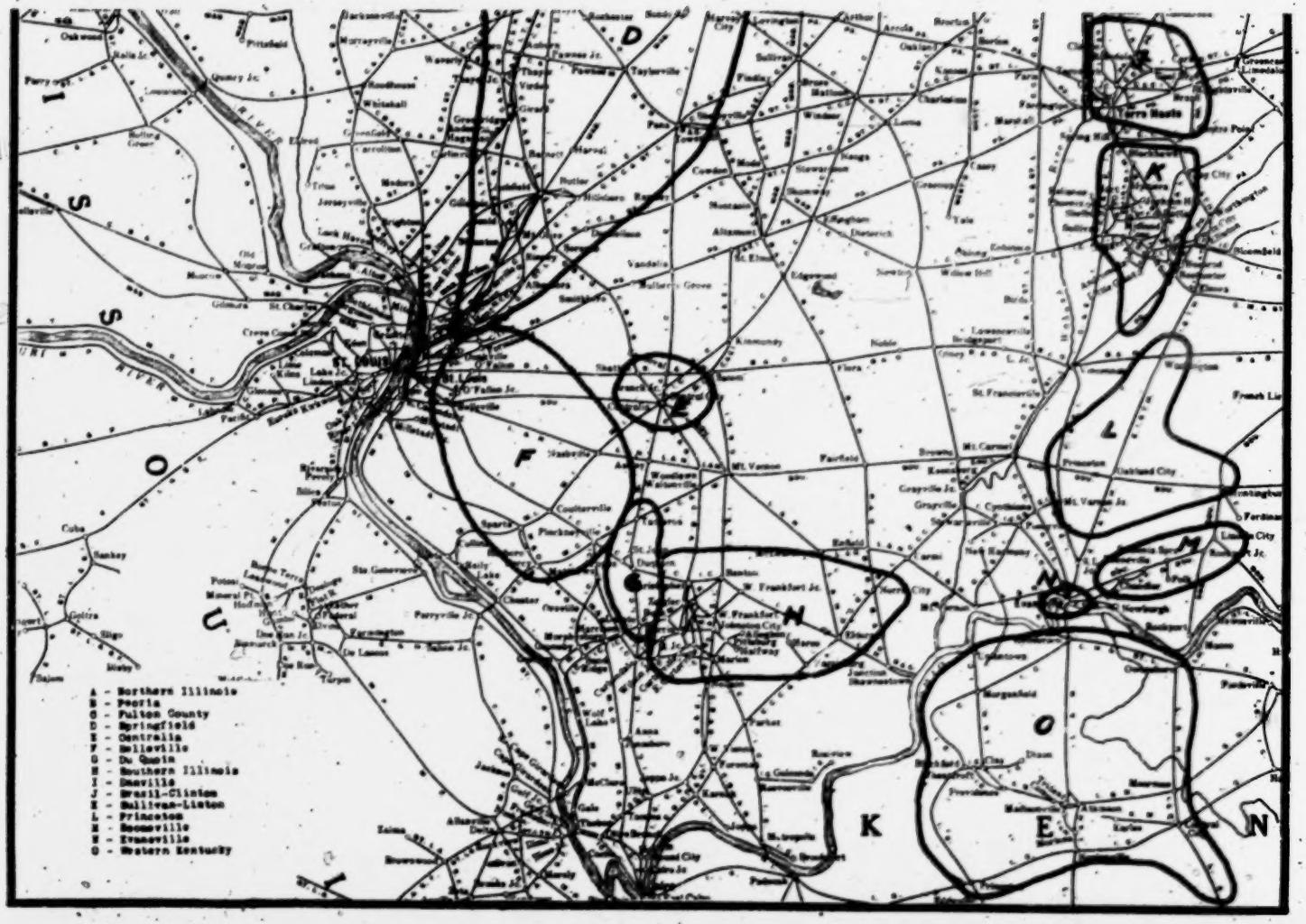
> "All that the Milwaukee has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside. Cf. *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 773."

The Commission exceeded its power and required the cancellation of proposed schedules without adequate and essential findings to support its order.

This Court has reiterated that an order of the Commission must be supported by basic and essential findings. It has held that the parties are entitled to know upon what facts and conclusions the Commission arrived at its decision. This is also necessary to enable the Court in reviewing an action of the Commission to pass intelligently upon the question of whether or not the Commission has acted within the power delegated to it by Congress.

In the absence of such findings, the Court is not "called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported". This language is contained in *Florida* v. *United States*, 282 U. S. 194, 215. The failure of the Commission to make appropriate findings "leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order". *Beaumont, Sour Lake & Western Railway Company* v. *United States*, 282 U. S. 74, 86; *United States* v. *Carolina Freight Corp.*, 315 U. S. 475, 488-489; *I. C. C.* v. *Columbus & Greenville Ry.*, 319 U. S. 551, 560.

Mere perfunctory and formal findings, couched in the words of the statute, are not enough, and the Court on review looks beyond such findings and examines the entire report to determine whether or not the Commission has acted within the powers granted to it. In *Southern*


A - Northern Illinois
B - Peoria
C - Fulton County
D - Springfield
E - Centralia
F - Belleville
G - Du Quoin
H - Southern Illinois
I - Danville
J - Brasil-Clinton
K - Sullivan-Linton
L - Princeton
M - Boonville
N - Evansville
O - Western Kentucky

Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 443, 449, the Court said:

> "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley * * *."

See *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 464; *United States* v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499, 510.

This Court has repeatedly said that mere recitals in the words of the statute that proposed rates were unreasonable, unjustly discriminatory, unduly preferential or prejudicial are not adequate findings of unlawfulness. See *Florida* v. *United States*, 282 U. S. 194, 215; *Beaumont, Sour Lake & Western Railway Company* v. *United States*, 282 U. S. 74, 86; *Norwegian Nitrogen Corporation* v. *United States*, 288 U. S. 294, 318.

Simple statements by the Commission that a rate is unreasonable, discriminatory or prejudicial is a mere conclusion or opinion of the Commission. The parties, as well as the Court, are entitled to know by what standards, and upon what facts, the conclusion was reached.

In the light of the foregoing, well established rules, we examine the report of the Commission to determine whether or not the order is supported by adequate findings, and to learn whether or not the Commission, in fact, acted within powers delegated by Congress.

On examination of the report, it will be found that

there "lurk in this report phrases or sentences suggestive" that the order was based upon a consideration of the unlawfulness of the proposed rates. A careful examination, however, makes it clear that the Commission mistakenly believed that it could arbitrarily adjust rates. It made the error which was so expertly condemned by Mr. Justice Cardozo when he spoke for the Court in reviewing an order of the Commission concerning the lawfulness of rates proposed for the transportation of coal by this same railroad between some of the identical points. *United States* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 499, *supra*.

Only four sections of the Interstate Commerce Act prescribe standards of conduct to guide the carrier in the publication of freight rates. Section 1 requires that the rates be reasonable. Section 2 prohibits discrimination. Section 3 makes it unlawful for a carrier to cause undue preference or advantage to any person, firm, etc., or to subject any person or firm to any undue prejudice or disadvantage. Section 4 contains the long and short haul provisions.

An analysis of the Commission's report discloses that there is no finding that the present or proposed rates of the Milwaukee, which apply to coal from mines on its railroad in Indiana to Rockford, Illinois, are unreasonable or that they are otherwise unlawful. Neither is there such a finding concerning its rates from the same mines to Beloit, Wisconsin. There is, however, an abundance of support in the report to sustain the conclusion that the rates are not unreasonable and, instead, that they fall within the "zone of reasonableness" which, by frequently repeated definition, lies in that area between an unduly high rate and one which may be so low as to fail to compensate the carrier for its service. Unduly low rates have been previously condemned by the Commission on the ground that the money lost on the low rated traffic must be recouped by

the carrier by making a higher charge on another type of traffic. In the absence of a finding that the condemned rates were not compensatory or a finding that they were so low that they cast a burden upon other traffic "there was, therefore, no basis for an order fixing minimum reasonable rates under Section 15 (1) of the Act." *Texas and Pacific Railway* v. *United States*, 289 U. S. 627, 633.

There, of course, is no suggestion by anyone that the condemned rates violate Section 4 of the Act. The recitals in the Commission's "conclusions" which apparently contain the Commission's ultimate findings condemn the Milwaukee rates as being unjustly discriminatory in violation of Section 2 of the Act, and as unduly preferential and prejudicial as between origins in the Brazil and Linton districts, and between the respective Indiana districts, and between the Indiana districts on the one hand and the Illinois districts on the other, in violation of Section 3 (1) of the Act. (Conclusions 1 and 2, R. 210.) An analysis of these conclusions will clearly demonstrate that while there is a recital, practically in the words of the statute, that the condemned rates violate Sections 2 and 3 of the Interstate Commerce Act, these recitals are not supported by any essential or adequate findings and the real reasons for the condemnation of the rates and the order requiring their cancellation are to be found in other recitals in the report indicating that the action of the Commission was wholly arbitrary and based on the assumption of power found nowhere in the Act.

Section 2 of the Interstate Commerce Act prohibits a carrier's charging any person a greater or lesser compensation for any service rendered than it charges any other person for doing a like or contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

There are many all rail routes from mines in all of the Indiana and Illinois groups to Rockford and Beloit in which the Milwaukee does not participate but, apparently, it was the conclusion of the Commission that the publication of a single line rate, applicable only via the lines of the Milwaukee from mines on its railroad in Indiana to destinations in northern Illinois and Beloit, Wisconsin, on a basis different from those rates in which the Milwaukee joined other railroads in moving coal from mines on other railroads to the same destinations, resulted in discrimination.

The only possible suggestion in the Report or Findings that the transportation from mines on the Milwaukee over its single lines to the destinations and the transportation from other mines over other routes, in which the Milwaukee joined, was "under substantially similar circumstances and conditions", is the recital that the average distances over the single line routes of the Milwaukee are approximately the same as, and in some instances less than, those over the joint line routes. The unsoundness of charging the Milwaukee Railroad with discrimination in these circumstances, where it controls only the rates over its own line and can only publish rates via joint routes which are agreed to by the participating carriers, is clear, but it is emphasized by the fact that in another part of the Report, the Milwaukee is required by findings and order of the Commission to join in rates with other railroads serving the Springfield, Illinois district and to the same destinations which are lower by 12¢ per ton than those required by the Commission to be applied from mines in Indiana to the same destinations and for much longer average hauls.

Section 3 (1) of the Interstate Commerce Act recites that it shall be unlawful for any common carrier to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, etc., or to subject any particular person, company, firm, etc.,

to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Commission's recital in the words of the Statute that the condemned rates result or would result in undue preference or prejudice is not supported or explained anywhere in the Report, except for the statement found on page 214 of the Report wherein it is said (R. 206):

> "Although only 4 of the 30 origins in the Brazil district and only about 9 of the 31 origins in the Linton district are served by the Milwaukee, in a recent representative period, of the total Brazil and Linton tonnage moved to Rockford, a representative destination, 95.4 percent from Brazil and 78.5 percent from Linton moved under the single-line rates of the Milwaukee. There is a movement from Brazil and Linton mines served by respondents other than the Milwaukee and the Illinois Central to these destinations, but it is relatively small. In general, all of the mines in these districts produce coal of the same quality and grade, and a difference of a few cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another."

It is true that the Milwaukee moves the greater part of the coal originating in the Brazil and Linton districts to Rockford. It is also true that during the period mentioned in the report, the rates on this coal were lower than the rates which applied from other mines in the same groups over other routes. Nevertheless, the Milwaukee offered to show in its petition for reopening and rehearing, which petition was denied, that during the period prior to 1934, and at the time when the rates from all mines on all railroads in the Brazil and Linton districts to Rockford, were on the identical level that the Milwaukee handled from 60 to 99.07 percent of all the tonnage moving to that destination from those districts. In refusing to reopen the case, the Commission denied the Milwaukee an opportunity

to explain the only statement which the report contains that can possibly be construed as supporting the finding that the condemned rates violated Section 3. Attention is respectfully directed to *United States* v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499, at page 503, where the Court said referring to railroads other than the Milwaukee:

> "They compete also to a slight extent for the carriage of coal from the Brazil and Linton groups, though the testimony is that their traffic from those points is only 1% or less as compared with 99% belonging to the Milwaukee."

The Court there referred to a period when the rates from the Brazil and Linton groups via all routes were on the same level, and before the Milwaukee had reduced its rates to restore the relationship with competing mines in Illinois. There are no adequate recitals of facts or findings to support any conclusion that the condemned rates violate Section 3 (1) of the Act.

The Report of the Commission discloses the real reason for the condemnation of the rates and clearly demonstrates the Commission's misconception of its power.

The Commission writes a "long and discursive narrative"* and concludes with certain recitals that the condemned rates are unlawful in respects heretofore referred to, but these recitals are without supporting findings and were thrown in as some justification for the order. They also serve as an attempt to distinguish this case from the one already passed on by the Supreme Court in *United States* v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499, *supra.*

* Justice Cardozo so characterized the Report of the Commission of 14 pages in the proceeding, reviewed by the Court in 294 U. S. 499, 505. Here the Commission requires 41 pages exclusive of 7 pages of appendices to reach the same conclusion but still does not meet the vital objection that "the Commission does not hold that the existing rate relation is intrinsically sound and fair".

The real consideration for the Commission's conclusions, however, and the underlying reason for the condemnation of the Milwaukee rates and the requirement in the order that they be increased 27¢ per ton to northern Illinois and 12¢ per ton to Beloit, Wisconsin, are found on pages 200 and 201 of the Report in these words: (R. 190.)

> "In considering the level of the rates from the respective Indiana and Illinois groups to these destinations, as well as to Beloit, it must be borne in mind that the differential between Linton and Princeton, the two most important Indiana groups, is only 7 cents for an average difference in distance to these 12 destinations of 65 miles (73 miles from the combined Princeton and Boonville groups). That differential is on a lower level than any other between important groups in this midwestern adjustment. Since it is of long standing, is in effect generally throughout the Northwest, and is not here sought to be changed, we do not feel warranted in approving its disturbance. That low differential necessarily reflects itself in relatively higher rates from the nearer Indiana groups, as well as relatively lower rates from the more distant Indiana group or groups, than might otherwise be warranted."

In other words, the Commission felt that it was authorized under the law to treat all of the Indiana districts as one huge mining group, and that it had the right under the law to inflate the rates applicable from the mines in the groups nearest the destination territory in order that those groups more distant from the destination territory might be accorded rates lower than would otherwise be justified. The Commission believes that it can compel receivers of coal mined on the Milwaukee Railroad in Indiana to pay rates higher than are warranted by distance and other transportation conditions, in order that coal mined in the Princeton and Boonville groups, located on other railroads, may be accorded rates lower than are

warranted by the distance and transportation conditions applicable to the movement of that coal.

The Commission recites in the paragraph quoted above that the relationship in the rates between the Indiana mines is one of long standing and that it is not sought in this proceeding to change that relationship. This statement is entirely inaccurate. The relationship in the rates between the Indiana mines for which the Milwaukee here seeks approval is a relationship which has existed since 1934. The proposed rates would also preserve the existing relationship between the rates applicable from Indiana and those applicable from Illinois. The Commission discusses the relationship in the rates between the Indiana groups which existed prior to 1934 and which, by this report and order, the Commission attempts to restore. The Commission has simply condemned rates which it says will disrupt existing relationships though the lawfulness of the relationship, said to be disrupted, is not passed upon. In doing this, the Commission attempts to repeat the act which this Court condemned in *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U. S. 499, 509. In that case, the Court said:

> "The Commission does not hold that the existing rate relation is intrinsically sound and fair. • • • The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control."

and further at page 510:

> "The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has put off to an indefinite future the remodeling of the rate structure for all the carriers affected, and which has left this particular carrier helpless in the interval.

> In brief, a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come."

So here, without finding that the relationship approved between the rates from the various origins in Indiana to the destination territory is lawful or "intrinsically sound and fair", the Commission condemns rates proposed by the Milwaukee. It says that such rates would disturb the relationship. The Commission's own recital indicates its doubt as to the lawfulness of the differential relationship between the Indiana groups. It was, therefore, clearly the Commission's duty, not only to determine the lawfulness of the differential relationship but also to implement such determination by adequate findings supported by evidence before condemning the Milwaukee Railroad's rates simply because such rates failed to conform. The Commission recites in the quoted paragraph that the differential between Linton and Princeton groups is only 7 cents for an average distance of 65 miles, and the apprehension with reference to the lawfulness of this differential is readily understandable when a comparison is made in the relationship between the rates from the mines in the Indiana groups with the relationship between the rates from the mines in the Illinois groups.

To illustrate, for a difference in distance of 106 miles to Rockford from mines in the Springfield, Illinois group less than from the mines in the Southern Illinois group, the Commission here approves a difference in rates of 30¢; while, for a difference in distance of 124 miles to Rockford from the mines in the Brazil district less than from the mines in the Princeton district, the Commission approves a difference in rates of 17¢. These are the Commission's

own figures taken from page 223 of the Report and explain why the Commission believed it should require the Brazil district shipper to pay more for the transportation of coal to Rockford and for less service, than the shipper located in the Springfield, Illinois group when he shipped his coal to Rockford. (R. 216.).

Of the Indiana groups the Brazil district is the coal mining group nearest destination and, in the opinion of the Commission, shippers located there must be penalized in order to justify the approved rates from mines in the more distant Princeton, Indiana group. The Milwaukee insists that mines on its railroad are entitled to the advantages of their geographical location and that rates therefrom should reflect the transportation conditions from that area and not be inflated in order to continue in effect some relationship in rates, the lawfulness of which is not passed upon.

III.

The Rates of a Carrier Can be Condemned as Discriminatory, Prejudicial or Preferential, Within the Meaning of the Act, Only When the Carrier Has it Within Its Power to Remove the Wrong.

We have heretofore pointed out the failure of the Commission to support its order with adequate findings and we here desire to demonstrate that even though the Commission had made the essential findings the order would be void. The rates of the Milwaukee are condemned as violating Sections 2 and 3 (1) of the Act, and those sections only. It would seem to be elementary that a railroad could not be charged with discrimination unless it had effective means of removing the discrimination. (*Central Railroad Company of New Jersey* v. *U. S.*, 257 U. S. 247, 259.) It is certainly contrary to accepted conceptions of

fairness that anyone can be charged with a wrong unless it is his conduct which causes the injury.

Here are the facts from which the Commission concludes the Milwaukee may be charged with the violation of Sections 2 and 3 (1) of the Act. The Milwaukee has a single line railroad from mines in the Brazil and Linton, Indiana districts to destinations on its line in northern Illinois and Beloit, Wisconsin. The principal destination in northern Illinois is Rockford, and both Rockford and Beloit use large quantities of industrial fuel. Both cities are served by other railroads which join in rates for the movement of coal from all Indiana, Illinois and western Kentucky origin mining groups. The Milwaukee Railroad insists that it has the right and the duty to establish rates over which it has control from mines on its railroad in the Indiana groups to the destinations in northern Illinois, and Beloit, Wisconsin which will permit it to move coal in competition with other railroads and which will permit the mine operators on its railroad to compete in the sale of coal with operators on other railroads in the Indiana and Illinois coal fields. The Milwaukee proposes to maintain rates over its single line which will continue a relationship with rates applicable from origins in Illinois, existing with unimportant interruptions since 1910, and a relationship which experience has proved necessary if mine operators on the Milwaukee are to compete with others in the sale of coal in this destination territory and if the Milwaukee is to participate in the handling of the traffic which produces essential revenue.

It is not even suggested in support of the Commission's recital that the condemned rates violate Sections 2 and 3 (1) of the Interstate Commerce Act, that the Milwaukee has any control over the rates from the points said to be discriminated against. The Commission recites no facts

to support this conclusion because there are no such facts. Clearly, the Milwaukee has no control over the rates from any mine in Illinois to Rockford, Beloit, or any other destination here involved. The Milwaukee serves no mines in Illinois. The rates for the movement of coal to all of these destinations are prescribed by a regulatory body and are not rates which the Milwaukee voluntarily establishes. Likewise, with respect to rates from mines in Indiana located on other railroads, the Milwaukee does not control such rates and, if the Milwaukee were permitted to withdraw from its participation in joint rates from such mines in Indiana and also from mines in Illinois to Rockford and Beloit, no shipper or receiver would be in any way benefited, as such action would not remove the so-called discrimination resulting from simple differences in rates. There would still be the same disparity in the rates between those applicable over the Milwaukee's single line and those applicable to the same destinations over the joint lines of other railroads which the Milwaukee could not remedy, and for which it could not be held responsible.

The identical factual situation was presented in *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627. In that case, it appears that the Texas & Pacific Railway operated across Texas and reached New Orleans and, while not reaching any of the Texas ports, it joined in rates with railroads for joint rates to those ports. While it appeared from these facts that the Texas & Pacific could control the rate to New Orleans, it had no effective control over the rates to the Texas ports. In discussing the error of the Commission, in its charge that the Texas & Pacific had violated Section 3 of the Act, the Court said on pages 648-650:

> "The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two

hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge. The principle comprehends, as well, instances of joint rates where the same carriers participate in the rates to both points, and where the originating (or delivering) carriers are different, but the delivering (or originating) carriers are the same. So, too, a carrier may be responsible for preference or prejudice where it participates in one of several through routes between point of origin and the prejudiced destinations, although its own line may reach only one or neither of the latter, *St. Louis S. W. Ry.* v. *United States*, 245 U. S. 136, for the discrimination is brought about by the disparity of rates, and the order requiring its abatement necessarily runs against all the carriers parties to them. If one or more of the railroads whose lines make up the through route should refuse, upon an order to equalize rates, to afford one of the others a proper division of the rate, the latter may obtain redress from the Commission under § 15 (6). Where, however, a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it.

"This rule has been consistently applied in respect of export and import rates to the ports. The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to Point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the

other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them."

Even though the Milwaukee controlled both the higher and lower rates the Commission could only require a removal of discrimination by affording the railroad an alternative.

While we have demonstrated, we believe, that the Milwaukee had no effective control over any rates other than the single-line rate from its mining origins in Indiana to the destination involved, the law is clear that a railroad charged with a discrimination must be afforded an opportunity to remove the discrimination by altering the rates. The clearest expression of the rule is that found in *Texas & Pacific Railway* v. *United States*, 289 U. S. 627, where it is said at page 650:

> "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Penna R. Co.*, 266 U. S. 191; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, 292; *Minneapolis & St. L. R. Co.* v. *Peoria & Pekin U. R. Co.*, 270 U. S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.
>
> "The principle has been approved in decisions of this court with respect to practices, *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U. S. 42; *Central Railroad of New Jersey* v. *United States*, 257 U. S. 247, and rates, *East Tenn. V. & G. Ry. Co.* v. *Interstate Commerce Comm'n*, 181 U. S. 1; *Penn Refining Co.* v. *Western N. Y. & P. R. Co.*, 208 U. S. 208, 221."

IV.

The Commission's Comparison of Average Rates and Distances From Each Origin Group to 12 Destinations Offers No Support For Its Order.

On page 226, (R. 220) the Commission sets out Appendix D, which is discussed on pages 198 (R. 187) and following of the Report. This appendix compares average rates and distances from the various origin mining groups to 12 destinations in northern Illinois. This is apparently offered in some justification of the Commission's order requiring higher rates from the Brazil district than from the Springfield district, for it shows that by averaging the distances to the 12 destinations one arrives at what appears to be longer average hauls from Brazil than from Springfield. Such comparisons are valueless and can have no weight as evidence. Rockford is the important city, consuming large quantities of industrial fuel and the market which producers of coal seek to reach. To average the distances between mines in the Brazil group and Rockford with the distances from mines in the Brazil group to some more distant point which consumes little coal, in order to arrive at a fair rate to the two stations is arbitrary and obviously unfair. Such a rate would prohibit the movement of coal from Brazil mines to Rockford, because it would be too high, and no coal could be moved to the more distant points even though the rate were low for there is no coal consumed there.

The discussion of the Commission in this regard simply confuses the real issues which are the lawfulness of rates to Rockford and their relation to the rates to Beloit. The proceeding was instituted by the Commission as the result of carrier efforts to make necessary adjustments in the rates as between Rockford and Beloit, to comply with the

Commission's order in *Fairbanks-Morse & Company, et al.* v. *Alton & Southern R. R., et al.*, 251 I. C. C. 181. These are both important industrial cities. The Milwaukee Railroad has the right to publish competitive rates to these important markets and to have the lawfulness of the rates tested by distance and service to those cities and to not have the rates condemned because of some wholly theoretical average of distances. The Commission's Report (R. 216) shows that the distance to both Rockford and Beloit from all mines in the Brazil, Indiana group is less than from the mines in the Springfield group.

V.

The Commission's Report.

Although the Record is extensive and voluminous, the issues presented in the proceeding before the Commission were relatively simple. The Report, however, is long, obscure and vague. Anyone reading and studying the Report reaches the inevitable conclusion that the Commission was uncertain about its reasons for the decision and was vainly seeking support for a result it believed to be just. There is no simple and clear statement of the facts from which the Commission reached its decision and the examination of which would make it possible for the Court to say whether the decision was right or wrong.

The following statement from the Report is found on page 192 of the Record:

> "To Beloit, • • • the rates • • • from Brazil and Linton mines on the Milwaukee are not here proposed to be changed and, therefore, are not specifically in issue in this proceeding".

This was obviously a correct statement. The rates to Beloit via the Milwaukee single line were not only "not

specifically in issue" they were not in issue in any respect under the order of investigation. In the face of this recital that such rates were not in issue, the Commission proceeded to require by its Order that the Milwaukee increase the rates not in issue by 12¢ per ton.

This Report best illustrates the type of report which the Court has repeatedly condemned, *Beaumont, S. L. & W. Ry. Co.* v. *U. S.*, 282 U. S. 74, 86.

Mr. Justice Cardozo said in *U. S.* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 499, 511:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong",

and in *I. C. C.* v. *Columbus & Greenville*, 319 U. S. 551, 560 ,in speaking of another of the Commission's Reports, Mr. Justice Douglas said:

> "The questions left unanswered by this report may be simple ones to experts. But we should have those answers before we put the imprimatur of this Court on the Commission's order",

and in *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 627, decided April 2, 1945, where there was before the Court a review of an order of the Federal Power Commission, Mr. Justice Douglas speaking for the Court said on page 634:

> "• • • we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. *Florida* v. *United States*, 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119; *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 464, 79 L. ed. 587, 594, 55 S. Ct. 268; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504, 505, 510, 511, 79 L. ed. 1023, 1028, 1029, 1031,

1032, 55 S. Ct. 462; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489, 86 L. ed. 971, 982, 62 S. Ct. 722. Their absence can only clog the administrative function and add to the delays in rate-making."

Conclusion.

It is clear from an examination of the Commission's Report that it misconceived its jurisdiction and has attempted to exercise power not delegated by Congress. It has attempted to deny the Milwaukee Railroad the right to adjust its rates so that it can continue to compete fairly in the transportation of coal to important consuming markets, and required the cancellation of rates, not because they are in violation of some provision of the Act, but because in the opinion of the Commission the rates from Milwaukee mines should be inflated in order to permit mines located in more distant groups to be accorded lower rates than would otherwise be warranted.

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